85-1330

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

518.77 ACRES OF LAND, MORE OR LESS, SITUATED IN HENRY COUNTY, STATE OF MISSOURI, AND WILLIAMS ROCK MINING COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In an Eminent Domain taking by the Federal Government, must federal common law allow just compensation for a property interest with significant market value, i.e. a lease option, not recognized as enforceable under state law?

Is Federal or state law controlling in defining what a property right is under the Fifth Amendment of the Constitution?

PARTIES

All parties to the proceeding in the United States District Court Western District of Missouri and the United States Court of Appeals for the Eighth Circuit are listed in the caption.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

518.77 ACRES OF LAND, MORE OR LESS, SITUATED IN HENRY COUNTY, STATE OF MISSOURI, AND WILLIAMS ROCK MINING COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari, issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, dated November 12, 1985, reviewing denied December 5, 1985.

OPINIONS BELOW

The initial decision of the United States Court of Appeals for the Eighth Circuit is case 84-2151 dated November 12, 1985, is printed in Appendix A at page A1, and the per curiam opinion is not officially reported. The decision of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Motion for Rehearing is dated December 5, 1985, and is printed in Appendix B at page A4. The issuance of the stay of the mandate of the United States Court of Appeals for the Eighth

Circuit valid until February 10, 1986, was filed January 10, 1986 and is printed in Appendix C at page A5 and is hereby incorporated by reference.

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the Honorable John W. Oliver, Senior Judge for the United States District Court for the Western District of Missouri, Western Division. The final judgment and order confirming report of commissioners and final order was filed and entered August 3, 1984 and is printed in Appendix D at page A6, and is unreported. The 24 page memorandum and order of Senior Judge John W. Oliver pertaining to major issues in the case is reported in 545 F. Supp. 1246.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 12, 1985. The Motion for Rehearing was denied on December 5, 1985. The Stay of Mandate until February 10, 1986 pending an appeal to this Court was entered on January 10, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1948).

STATUTE INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The principal business of Petitioner, Williams Rock Mining Company, Inc. was the production and sale of limestone products in the form of road rock, concrete aggregate and agricultural lime. The company was owned by three Williams Brothers whose family began producing limestone at the subject property in 1938 through the use of an underground mine. It was a very successful family business in rural Missouri until the United States of America condemned it and terminated the mining operation on May 30, 1979 under Public Law 87-874 for the construction of the Harry S. Truman Dam and Reservoir.

It was stipulated at trial by the Petitioner and Respondent that the rock reserves of the high quality Burlington limestone on the subject tract on the date of taking was in excess of 50 years. It was also stipulated by the Petitioner and Respondent at trial that the leasehold had the following improvements:

40 ton scales with concrete platform and scale house - 30.3′ X 14.2′

Eating shed - 15.2′ X 14.2′ with a 6.2′ X 3′ addition

Shop - 33.8′ X 31.4′

Loading bins - 23.7′ X 20.1′ - 4 bins with 300 ton capacity & conveyor shed - 10′ X 48.7′

95′ long 18″ wide conveyor belt - 3 screens (two 42″ and 84″ and one 4′ X 10′ single deck) - 3 electric motors (5, 15 and 20 H.P.)

Portable crusher foundation & dump - "L" shaped wall 4 to 5.5′ high, 35′ long, 12″ thick concrete slab 19′ X 36′; dirt and gravel slope for dump

Explosion shed - 8′ X 10′ X 8′

Hammer mill cover - pole shed 20′ X 13.8′, ht. 7.5′ to 16.5′

Inspection shack - 13.8′ X 9.7′

Haul Road - 1.5 miles, asphalt

Stockpile area - 18 acres hard-packed road

Levee - approximately 1/4 mile long

Haul road from surface to mine opening

Mine entrance

Electrical service and wiring & telephone service

Air vents

Outhouse

It was further stipulated to the parties that this separately condemned leasehold interest of the Williams family consisted of three leases which covered the underground mine. The surface interests owned by others were separately purchased by the government prior to condemnation of petitioner's leases. One lease was dated June 16, 1973 between Mary Ellen Hann and Bessie Mae Good-

brake and Williams Rock Mining Company, Inc. A second lease dated March 2, 1976 between Wallis and Ruth Thompson and Williams Rock Mining Company, Inc. and a third lease dated, March 9, 1976 between Clyde and Lucille Schmidt and Williams Rock Mining Company, Inc.

The most critical of these three leases was the Hann-Goodbrake lease of June 16, 1973. This lease covered the entrance of the mine and the majority of the long term improvements, underground storage and unmined rock reserves, stipulated to by the parties. A copy of this recorded lease is printed as Appendix E at page A10. This lease is a ten year lease with an option provision. The exact language of the first option is as follows:

> "Second party shall have the first option; at the remainder of this lease, to lease above lands for an additional period of ten years. The terms, conditions and royalty to be paid to be agreed upon between the parties at that time."

The Respondent, on the eve of the trial, filed a Motion for Pretrial Rulings contesting the validity of the 10 year option provision of the Hann-Goodbrake Lease for valuation purposes. On August 30, 1982, the Honorable Judge Oliver issued 5 pretrial rulings three of which are as follows:

A. The ten year option provision in the Hann-Goodbrake lease is unenforceable, so that the lease expires June 16, 1983. The Hann-Goodbrake lease should not be accorded a value beyond that date on the expectation that it may have been renewed.

B. The option in the Hann-Goodbrake lease for the lease of underground storage space expires with the lease on June 16, 1983.

C. After June 16, 1983, for purposes of valuation, Williams Rock Mining Company cannot utilize the Hann-Goodbrake land for any mining purposes, including use of the surface or subsurface for machinery, equipment, crushing, stockpile, hard road and removal of limestone.

These three pretrial rulings excluded the "heart and soul" of the leasehold mining operation of the Williams family from valuation purposes. The mine entrance and the major improvements on the Hann-Goodbrake Lease could not be valued beyond the expiration date of June 16, 1983. The value period for the Hann-Goodbrake Lease was fore-shortened from June 16, 1993 to June 16, 1983, leaving approximately only four (4) years for valuation purposes from the May 30, 1986 date of taking. In essence, Judge Oliver found that the Hann-Goodbrake provision created a "conditional option to renew" and not a valid right of first refusal as the Williams Rock Mining Company, Inc. claimed. (545 F. Supp. 1246, 1948.) As such, Judge Oliver found the provision unenforceable under Missouri law and therefore not a compensable property right.

As a result, Williams Rock Mining Company, Inc. presented its evidence to the Land Commission pursuant to Rule 71 A (h) consistent with Judge Oliver's pretrial orders. The Petitioner made a proper offer of proof at trial that if the Hann-Goodbrake Lease 10 year option provision could be valued up to June 16, 1993, the expert testimony of fair market value for the leasehold interest of the Petitioner would be $860,000.00 (Landowner's Exhibit #1). On the other hand, landowner's expert testimony of fair market value for the leasehold interest *without* the option period was $330,000.00. The Commission's finding which was approved by Judge Oliver was

$159,000.00, $38,000.00 less than the estimated compensation deposited by the Government.

Throughout the proceedings the Petitioner has claimed that the Hann-Goodbrake option provision of the lease was a valid property right compensable under the Fifth Amendment of the Constitution. However, the District Court Judge and the Court of Appeals Judges have not so agreed. This was especially disheartening for the Williams Rock Mining Company, Inc. who had originally leased the property in 1953 and twice renewed and once extended the lease on the same terms in 1956, 1963 and 1973. All of the above written leases, including the 1973 lease, were properly recorded in Henry County, Missouri.

REASONS FOR GRANTING THE WRIT

I.

The Court Below Has Decided Important Questions of Just Compensation Due Lessees for Property Rights Held Unenforceable Under State Law Which Has Not Been, but Should Be Settled by This Court.

The critical renewal clause provision of the Hann-Goodbrake Lease is as follows:

> Second party shall have the first option, at the termination of this lease, to lease above lands for an additional period of ten years. *The terms, conditions and royalties* to be paid to be agreed upon between the parties at that time (Emphasis added).[1]

The Petitioner's primary position in the district court and the Court of Appeals is that this provision is enforceable under Missouri law as a "right of first refusal".

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1. See full text of Lease in Exhibit E, page A10.

Since the district court found the provision created a "conditional option to renew leaving open essential terms, it was held unenforceable under Missouri law and therefore, not compensable in condemnation." 545 F. Supp. 1246, 1248. The Court of Appeals affirmed the district court's conclusion on the non-enforceability of the Hann-Goodbrake renewal option because the district court's conclusion was based upon a permissible interpretation of Missouri law. See *Mitchell v. City of Minneapolis*, 707 F. 2d 490, 491 (8th Cir. 1983).

Alternatively, it will be Petitioner's position in this Court, as it was below, that even if the Hann-Goodbrake Lease is unenforceable under Missouri state law it is still compensable in a federal condemnation action.

The lower courts relied on the case of *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). This case stands for the general principle that a lessee's right of renewal is compensable in a condemnation proceeding "if such right continues under state law" but a mere expectancy is not compensable. Petitioner's position is that this case is not controlling and should be overruled or distinguished.

United States v. Petty Motor Co., supra, decided in 1946, is an antiquated decision in this modern economic climate or major United States Government land acquisition and should be overruled or distinguished. The United States Government should not be allowed to acquire property for a federal condemnation project in a federal court under federal rules with federal tax money and use as a shield of protection, state laws to defeat state citizens from receiving just compensation for their property which they were forced to relinquish. The Fifth Amendment of the United States Constitution does not allow this taking without compensation. The Fifth Amendment states that

a person shall not be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation.

The Fifth Amendment and other Amendments of the United States Constitution protect personal liberties on a due process level. A landowner is entitled to these same protections in a federal condemnation action. This includes creation of a property right under Federal common law.

The series of landmark cases of *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938), developed the Erie Doctrine, the well established principle that in substantive areas of law, state law applies.[2]

However, since the Erie Doctrine was implemented there has been a trend in cases to develop "federal common law" or as Justice Rutledge termed it, "the law of independent Federal judicial decision". *U.S. v. Standard Oil Co.,* 332 U.S. 301, 308 (1947). By virtue of the Supremacy Clause, it is binding on state courts as well as in federal courts.

Federal common law has developed in many contexts. It is the Petitioner's position that it should apply in the case at bar in defining a property right simply as "what it would bring at the marketplace." In other words, what a willing buyer and what a willing seller would agree for an arms'-length sale price on or about the date of taking (fair market value). State law should not be used to limit the rights of just compensation under the Fifth Amendment by limited construction of a property

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2. This appears the basis for the holding of *U.S. v. Petty Motor Co., supra. Petty* decided only eight years after *Erie* follows the strict constitution of the Erie Doctrine.

right under state law. State law would be supplemented and the individual residents of the fifty states and the federal government would all be protected from antiquated property laws of different states.

Eminent domain proceedings implicate the Constitution, congressional enactment and national necessity. In these contexts it is thought that state law should be supplemented because there is a possibility that it will not be sufficiently sensitive to federal concerns, it is not likely to be uniform and would develop at various rates of speed. Significant groups of cases in this Federal common law category involve controversies between states,[3] admiralty matters,[4] and foreign relations.[5] It is also seen in settling disputes in federal patent infringement law[6] and National Flood Insurance Program cases. See *Schell v. National Flood Insurers Association,* 520 F. Supp. 150 (1981). Rights and duties of the United States on its commercial paper are also governed by federal common law. See *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943). The Clearfield principle has also been applied in government tort and property litigation.[7]

The Supreme Court has held through its cases that the central factor in determining whether federal common law is appropriate is the extent to which government rights and liabilities are implicated, such as the "Agent Orange" product liability litigation.

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3. *Illinois v. City of Milwaukee,* 406 U.S. 46 (1972).

4. *U.S. v. Reliable Transfer Co.,* 421 U.S. 397 (1975).

5. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964).

6. *Bergstrom v. Sears Roebuck & Co.,* 532 F. Supp. 923 (D.C. Minn. 1982).

7. *U.S. v. California,* 655 F.2d 914 (C.A. 9th 1980).

It is clear that the *Erie* case and the federal court decisions following it apply in federal question cases as well to diversity cases reflects the principle that federal courts should apply state law to legal issues unless there is some federal interest sufficient to justify the application of an independent federal standard. This is in keeping with the policy expressed in the Rules of Decisions Act, 28 U.S.C. Section 1652. An analogous case is the First Circuit in *Chicago Title Ins. Co. v. Sherred Village Associates,* 708 F. 2d 804 (C.A. 1st 1983), wherein the First Circuit held that vague terms of a mortgage construed under Maine State Law should not be used. Rather, Congress intended state law to define the types of mortgage the Department of Housing and Urban Development may ensue, it did not intend to adopt all state mortgage laws.

It is undisputed that the basis of compensation in federal condemnation proceedings is a matter of federal law. *U.S. v. Miller,* 317 U.S. 369 (1943). The Supreme Court must mandate the boundaries of applicable state and federal law in determining compensation for a property right.

FURTHERMORE, an exhaustive analysis of the application of the use of state as opposed to federal law in a condemnation case was made by counsel. The general rule is *not bound* by state law in federal condemnation actions. The condemnation court will only look to state law as an *aide* in determining what property interests are compensable but not be definitively bound by state law. See the controlling decision of the United States Court of Appeals for the Eighth Circuit in *United States of America v. 3,035.73 Acres of Land,* 650 F. 2d 938 (1981), where an Arkansas timber cutting option was afforded the status of real property for condemnation purposes. See also *Alamo Land & Cattle Co., Inc. v. Arizona,* 424

U.S. 295 (1976), standing for a similar principle of non-binding state law.

The Supreme Court, in *Almota Farmer's Elevator and Warehouse Co. v. U.S.*, 409 U.S. 470 (1973), used the concept of federal common law to award compensation damages to a lessor for improvements left on the premises after the lease expired. The *Almota* decision is discussed in detail in Argument II of this brief.

Another persuasive case is the First Circuit case of *United States of America v. 967,905 Acres of Land*, 447 F. 2d 764 (1971); the court stated that in a condemnation case a federal court will ordinarily look to state law to determine whether a given object is real property or whether it is personal property. However, the court stated that the ultimate question is a federal question and not a state law question. The petitioner feels that these cases are analogous to the case at bar.

Simply stated, a mandate of this court on this issue is necessary for all property owners in America to know what law applies to their property in a federal condemnation action. A mandate is further needed in the case at bar to allow the petitioner the opportunity to present its evidence of $860,000.00 of fair market value for the entire leasehold including the ten year option provision.

II.

The Court Below Has Decided Important Questions of Just Compensation in Ways Inconsistent With the Applicable Decision of Almota Farmer's Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).

Previously stated in the statement of the case the Petitioner and Respondent stipulated to a lengthy list of

improvements (pages 3-4). Furthermore, as stated in the brief, the majority of the improvements were located on the Hann-Goodbrake Lease (Brief at page 5). In Judge Oliver's order of August 30, 1982, Judge Oliver stated that the lease and all its improvements could not be afforded to offer evidence establishing value of the improvements beyond the June 16, 1983 date. This order is in direct conflict with the decision in *Almota Farmer's Elevator and Warehouse Co. v. U.S.* decision. 409 U.S. 470 (1973). In that case, the Supreme Court held that the landowner could receive economic value for the improvements beyond the term of the lease, which did not have a renewal provision. The Court held that the concept of "just compensation" is measured by what a willing buyer would have paid for the improvements taking into account the possibility that the lease might be renewed as well as that it might not. This argument was raised in the District Court contrary to the Court of Appeals statement that it was not. It was couched and included with the Petitioner's request that the 10 year option provisions request of the Hann-Goodbrake Lease, including all the rock reserves and improvements, should be accorded a value beyond the June 16, 1983 date. Granted, the principle of the *Almota* decision was not separately raised. The reason being is that the landowner was seeking compensation for more than just the improvements beyond the June 16, 1983 date.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed November 12, 1985)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2151

United States of America,
Appellee,

v.

517.77 Acres of Land, More or Less situate in Henry County, State of Missouri and
Williams Rock Mining Company, Inc., et al.,
Appellants.
Tract Nos. 12670M, 12670M-2 and 12670M-3.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: October 15, 1985
Filed: November 12, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

This is a condemnation case involving the taking of the leasehold interest possessed by Williams Rock Mining Company (Williams Rock) under four leases. The

case was tried by the Land Condemnation Commission pursuant to FED. R. CIV. P. 71A(h). The Commission's finding that Williams Rock's leasehold interest had a value of $159,000 was adopted by the district court.

Williams Rock's primary contention on appeal is that the district court erred in instructing the Commission that the renewal option in the Hann-Goodbrake lease was not compensable. A lessee's right of renewal is compensable in a condemnation proceeding "if such right continues under [state] law", but a mere expectancy is not compensable. *United States v. Petty Motor Co.*, 327 U.S. 372, 380-81 & n.9 (1946). The Hann-Goodbrake renewal clause provided:

> Second party shall have the *first option,* at the termination of this lease, to lease above lands for an additional period of ten (10) years, *the terms, conditions and royalty to be paid to be agreed upon between the parties at that time.* (Emphasis added.)

The district court found that the provision created a "conditional option to renew", not a right of first refusal, because the provision is unambiguous and "neither expressly nor impliedly refers to any transaction between the lessor and a third party." 545 F.Supp. 1246, 1248. Since the clause left open essential terms, it was held unenforceable under Missouri law and therefore, not compensable in condemnation.

On issues of state law, we ordinarily give great weight to the district court's conclusion. *See Mitchell v. City of Minneapolis*, 707 F.2d 490, 491 (8th Cir. 1983). Since the court's conclusion on the enforceability of the Hann-Goodbrake renewal option is based on a permissible interpretation of Missouri law, we affirm the court's ruling.

In connection with its primary argument, Williams Rock also contends that the court erred in not instructing the Commission that the improvements on the Hann-Goodbrake land (i.e., a mine face, roads, a few sheds and a levee) could be given value beyond the expiration date of the Hann-Goodbrake lease. Williams Rock relies upon *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973), wherein the Court held that "'upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed.'" Williams Rock, however, failed to raise this argument below. The district court discussed *Almota Farmers* in a footnote, 545 F.Supp. at 1247 n.2, but only in connection with the compensability of the renewal option; *Almota Farmers* was not discussed in connection with the valuation of improvements. Since "it is our policy to refuse to consider a question that was never presented to, or passed upon by a trial court," we need not consider Williams Rock's improvement valuation issue. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1281 (8th Cir.), *cert. denied*, 449 U.S. 1042 (1980).

Williams Rock's final contention is that the Commission erred in partially relying on the testimony of the government's witness. We have examined the claimed errors in this regard and find that no reversible error occurred. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2151-WM

United States of America,
Appellee,

vs.

Williams Rock Mining Company, Inc., et al.
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Appellants' petition for rehearing has been considered by the Court and is hereby denied.

December 5, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2151-WM

United States of America,
Appellee,

vs.

Williams Rock Mining Company, Inc., et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The motion of appellant for stay of mandate pending certiorari proceedings is granted. Issuance of the mandate is stayed to and including February 10, 1986. If during that period time there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that appellant has filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition by the Supreme Court. If a petition for writ of certiorari is not filed by February 10, 1986, the mandate of this Court will issue on that date.

January 10, 1986

APPENDIX D

(Filed August 3, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

Civil No. 79-0483-CV-W-1
Tract Nos. 12670M, 12670M-2
and 12670M-3

UNITED STATES OF AMERICA
Plaintiff,

v.

518.77 Acres of Land, More or less, Situate in Henry County, State of Missouri; and WILLIAMS ROCK MINING COMPANY, INC., et al.,
Defendants.

FINAL JUDGMENT AND ORDER CONFIRMING REPORT OF COMMISSION AND FINAL ORDER OF DISTRIBUTION

Now this cause comes on for hearing upon the Court's own motion for a judgment and order adopting, ratifying and confirming the Report of the Commission filed herein on June 27, 1983. The Court, being fully advised in the premises, finds that:

1. This is a proceeding instituted by the United States of America, plaintiff, for the purpose of acquiring certain lands, designated as Tract Nos. 12670M, 12670M-2 and 12670M-3, and more specifically set forth and described in the Complaint and Declaration of Taking, filed herein.

2. The use for which the property is taken is in connection with the Harry S. Truman Dam & Reservoir, Missouri, and it has been acquired by means of condemnation under judicial process in conformity and in compliance with the various provisions of the Acts of Congress set out in the Complaint. The United States of America is empowered and has the right, pursuant to said Acts of Congress and upon the duly authorized actions of officers of the United States Government thereunder, as further set out in the Complaint, to acquire such estates in said land for public use by condemnation under judicial process.

3. All parties interested directly or indirectly in said land have been served with process as provided by law or have entered general appearances herein, and the said land, together with all claimants and parties interested therein, are within the jurisdiction of this Court, which has power and authority to enter this judgment.

4. On the 30th day of May, 1979, the estates taken in the above-designated tracts vested in the United States of America, upon the filing of the Declaration of Taking and the depositing therewith in the registry of this Court the sum of $197,400.00, which sum was estimated by the acquiring agency to be the just compensation for the estates taken in said tracts.

5. The owner of said tracts prior to the date of taking was Williams Rock Mining Company, Inc.

6. The Report of Commission filed herein awards to said defendant landowner as just compensation for the taking of said estates in their property the sum of $159,000.00.

7. There is an excess of $38,400.00 between the amount deposited as estimated just compensation ($197,400.00) and the amount of said award ($159,000.00), which excess

should be paid by defendant to plaintiff. Interest on the amount to be paid by defendant to plaintiff as restitution for the excess of the distribution over the final award shall be computed from the date of final judgment. The rate of interest shall be calculated according to the provisions of 28 U.S.C. § 1961.

8. Of the original deposit of estimated just compensation, the sum of $197,400.00 has been distributed to the defendant landowner by order of this Court.

9. None of the other defendants, known or unknown, named and designated in the Complaint, have any right, title, or interest in and to, or lien upon the real estate described in the above-designated tracts, and are not entitled to any share of the just compensation awarded therefor.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED THAT:

The above and foregoing findings are hereby made a part of the judgment and order of the Court.

The Report of Commission filed herein on June 27, 1984, covering the tracts hereinbefore designated be confirmed and approved in all respects; and that the Commission's findings of fact and conclusions of law are hereby adopted as the findings and conclusions of this Court.

On May 30, 1979, title to, and the right of immediate possession of, Tract Nos. 12670M, 12670M-2 and 12670M-3 vested in plaintiff, to the extent of the estates therein taken, free and discharged from all liens and claims whatsoever, and the right to just compensation for the property taken vested on the same date in the persons entitled thereto.

All defendants, known or unknown, named and designated in the Complaint herein, other than those to whom

compensation is specifically awarded herein, are hereby forever barred and excluded from asserting any title, interest or estate in, lien upon or claim against the estate taken in said tracts.

The total sum of $159,000.00 is hereby awarded as just compensation in full for the taking of said estates in the hereinbefore described land, all in accordance with the findings, conclusions and recommendations of the Commission filed herein.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by this Court that the defendant Williams Rock Mining Company, Inc. pay forthwith to the plaintiff, the United States of America, made payable to the United States Treasurer, the amount of $38,400.00 as restitution for the excess of the distribution over the final award computed from the date of final judgment. The rate of interest shall be calculated according to the provisions of 28 U.S.C. § 1961.

Upon completion of the foregoing distribution, this cause shall be deemed closed.

Done in chambers at Kansas City, Missouri, this 3rd day of August, 1984

/s/ John W. Oliver
JOHN W. OLIVER, Senior Judge
United States District Court

Entry prepared by:

/s/ Linda L. Parker
LINDA L. PARKER
Assistant United States Attorney
Entry approved by: As to form only.
/s/ Joseph R. Borich
JOSEPH R. BORICH
Attorney for Defendant

APPENDIX E

(Filed June 18, 1973)

LEASE

This lease made and entered into this 16th day of June, 1973, by and between Mary Ellen Hann and Bessie Mae Goodbrake, parties of the first part, and Williams Rock Mining Company, Inc., party of the second part.

WITNESSETH:

In consideration of the royalty to be paid by second party to first parties, first parties hereby lease unto second party, for the term and upon the conditions hereinafter set forth, the following described premises, to-wit:

The North Twenty-Five (25) acres of the East Half (E½) of the Northeast Quarter (NE¼) of Section Six (6), Township Forty (40), Range Twenty-Five (25) lying on left bank of Grandriver; the Northeast Quarter (NE¼) of the Southeast Quarter (SE¼); the South Half (S½) of the Southeast Quarter (SE¼); the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section Thirty-One (31); the West Half (W½) of the South Half (S½) of the Southwest Quarter (SW¼) of the Southwest Quarter (SW¼), and Nine (9) acres off the west end of the North Half (N½) of the Southwest Quarter (SW¼) of the Southwest Quarter (SW¼) and all that part of the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) West of K.C.C. & S. Railroad, containing Two and One-Half (2½) acres, and all of the Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) which lies West of said K.C.C. & S. Railroad, containing Sixteen (16) acres and all the Northwest

Quarter (NW¼) of the Southwest Quarter (SW¼) which lies West of said railroad, containing Thirty-Seven and One-Half (37½) acres, in Section Thirty-Two (32), all in Township Forty-One (41), Range Twenty-Five (25) containing in all Two Hundred Sixty-One (261) acres, more or less, all in Henry County, Missouri.

This lease is for a term of Ten (10) years, beginning June 16, 1973, and is for the purpose of removing, crushing and selling the limestone rock on above described lands.

Second party is to pay first parties the sum of Five (5) cents per ton for all limestone removed and sold from said lands, payment to be made by the 15th day of each month for all limestone removed and sold during the preceding month.

Second party to have free access to and from said lands at all times for the purpose of this lease.

Lessors will grant additional land as required for stock-pile area for regular operation of business.

Second party to construct and maintain any and all roads used and to be used by them over the lands of first parties.

Second party shall have the first option, at the termination of this lease, to lease above lands for an additional period of Ten (10) years, the terms, conditions and royalty to be paid to be agreed upon between the parties at that time.

In the event that the second party shall have the opportunity to negotiate contracts for sale of rock under one contract which shall exceed ten thousand tons for the particular contract, it is agreed that the royalty to

be paid to the first parties on all over ten thousand tons shall be reduced to four cents (4¢) per ton under that particular contract. Five cents shall be paid on the first ten thousand tons and four cents on all over ten thousand tons on each contract.

At any time during the lease or any extension thereof, the second party will have the option to lease the underground storage space where the property has been mined for the purpose of developing a storage site. If the second party desires to exercise this option it shall give written notice to the first parties notifying them that they desire to exercise the option to lease the open mine for storage purposes. The second party will develop the storage area and second party will pay to the first parties five cents on every dollar that they receive in rental charges on the area rented by the second party. The term of this rental lease shall be for Ninety-Nine (99) years from the time of exercising the option.

It is agreed and understood that lessee shall not dig, mine or tear up any of the land of the lessors where limestone in paying quantities is not found, nor shall lessee mine said limestone, nor dig or tear up any land within a radius of one hundred (100) feet of the drilled well of lessors on said premises. Lessee is given free access over the lands of lessors for the purposes of this lease, but shall use only the regular established roadways in getting to and from operations. Lessors grant to lessee two (2) acres of farming land in the wheat field for machinery and for stock piling material, said two acres to be designated by lessors. Lessors will grant additional space as required for stockpile area for regular operation of business.

Second party, lessee, at the termination of this lease or any extension thereof, shall have the right, all royalty

having been paid, to remove all their machinery and equipment from said lands.

Lessee shall not tear up the good farming land, but if they mine same shall get the limestone out from underneath, so as to not interfere with the top soil.

It is understood that the second party has leased from Otto Schmidt, (now Wallace and Ruth Thompson), land in the immediate vicinity of the property owned by the first parties. Said lease to be for the purpose of selling insurance. It is agreed that the second party may establish rock crusher on first parties property and may haul to the crusher the rock which is mined from the Otto Schmidt, (now Wallace and Ruth Thompson), property. The first parties further grant to the second party a roadway to haul the rock across the first parties' land.

The second party agrees to pay the first parties, Mary Ellen Hann and Bessie Mae Goodbrake, the sum of Two Cents (2¢) per ton for all the rock that is hauled from the Otto Schmidt, (Now Wallace and Ruth Thompson), land and crushed on the first parties land and sold by the second party.

/s/ Bessie Mae Goodbrake
/s/ Mary Ellen Hann
FIRST PARTIES

WILLIAMS ROCK MINING CO., INC.
BY: /s/ J. L. Williams, Jr., pres.
SECOND PARTY

(Notarization omitted in printing.)